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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 289

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

TRUST COMPANY OF GEORGIA AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JACK J. SPALDING, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 112–124) is reported in 55 F. Supp. 269. The opinion of the Circuit Court of Appeals (R. 128–137) is reported in 149 F. 2d 120.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 3, 1945. (R. 137.) Petition for a writ of certiorari was filed on August 2,

1945, and was granted October 8, 1945 (R. 138). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a relinquishment of a power to amend each of two trusts for the purpose of preventing the inclusion of their corpora in the decedent's gross estate, in order to avoid the payment of the additional estate tax resulting from such inclusion, was made by the decedent "in contemplation his death" within the meaning of Section 302 (d) (1) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Statute and regulations involved are set out in the Appendix, *infra*, pp. 30–33.

STATEMENT

So far as material here, the facts found by the District Court (R. 121–124), and restated by the court below in its opinion (R. 128–130), may be summarized as follows:

The decedent, Jack J. Spalding, a resident of Fulton County, Georgia, died December 8, 1938, at the age of 82. (R. 121.)

In 1925, the decedent, in order to relieve the financial distress of his daughter, Suzanne (Mrs.

Schroeder), and of one of his sons, Jack, made a transfer of securities in separate trusts of the value of $50,000 for each. In 1934, he added securities to each trust of the value of $50,000. (R. 122.)

The trusts were of the type usually referred to as "spendthrift" trusts and were irrevocable, except that the decedent, in both the original 1925 trust agreements and in the 1934 additions thereto, reserved a power to amend as follows (R. 129):

> During my life, by the unanimous consent of the said trustee, my said daughter [son] and of myself, the terms of this agreement may be amended, changed, enlarged, or limited, but in no event shall the conveyance of said stock to the party of the second part be revoked.

Otherwise, each trust and the amendment thereof, above referred to, provided that the income thereof should be paid to the daughter and son, as the case might be, for life, or to her or his children in the event that she or he undertook to alienate the income or otherwise dispose of it, and that upon the death of either the income was to be paid to her or his children and their descendants, *per stirpes*, until the youngest child became of age, at which time the entire fund should be turned over to such child or children and their descendants, *per stirpes*; provided that, if either she or he left no child surviving, she or he might

dispose of the fund by will, and, if she or he did not do so, then the fund should revert to the decedent or to his estate, passing to the parties taking the same in like manner as the residuum of his estate is shared.[1] (R. 28–29.)

At the time, the decedent believed the state of the federal law to be such that the reservation of such power would not require the inclusion in his gross estate at his death of the value of the corpora of the trusts. (R. 77.) But when the decision of this Court in *Helvering* v. *City Bank Co.*, 296 U. S. 85, holding otherwise, was called to his attention in May, 1937, by another son, Hughes, who was a member of the decedent's law firm, the decedent forthwith relinquished the power. (R. 129–130.)

The findings of the District Court that the decedent had prepared and executed an instrument renouncing the power reserved in the trusts upon being advised that the gifts remained a part of his estate for estate tax purposes (Finding 10, R. 123), and that his purpose in relinquishing it when he did was "so that they [the trusts] would not be a part of his estate for estate tax purposes" (Finding 12, R. 123–124), were accepted by the

[1] By the 1934 amendment of each trust, the right of reverter of the estate was eliminated, it being instead provided that in the event the daughter or son failed to dispose of the corpus of the trust by will, then the fund should go to her or his heirs and administrators, as provided by law. (R. 25, 32).

Circuit Court of Appeals as supported by the evidence (R. 132). As the Circuit Court of Appeals stated, the District Court had concluded from such findings that an intent to avoid an estate tax, standing alone, was not conclusive that a gift or a release of a power was made in contemplation of death. (R. 132.)

The Circuit Court of Appeals affirmed the judgment of the District Court on the ground that, in its opinion, the relinquishment of such a power will be held to have been a testamentary disposition only if the decedent "deems death to be near at hand" (R. 136), and that (R. 136–137):

> * * * in view of the right and privilege of the taxpayer, often declared by the Courts and long recognized by the Congress, to decrease the amount of his taxes or to avoid them, altogether by means which the law permits, the mere making of a gift more complete by freeing it from estate taxes that otherwise would accrue upon the donor's death will not be construed as the equivalent of a testamentary disposition in the absence of proof that the relinquisher considered that death was near at hand.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that a relinquishment of a power to amend, change, enlarge or limit a trust, reserved therein by the decedent, was not made by

him in contemplation of his death within the meaning of Section 302 (d). (1) of the Revenue Act of 1926, as amended, even though in making it the decedent was motivated solely by a purpose to prevent the inclusion of its corpus in his gross estate at his death in order to avoid the additional estate tax resulting from such inclusion.

(2) In holding that a relinquishment so motivated was not made in contemplation of his death unless the decedent deemed death to be near at hand.

(3) In failing to hold that the respondents had not sustained the burden of proof resting upon them to show that the relinquishment in question was not made in such contemplation.

(4) In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

1. The statute requires the inclusion in the gross estate of both a transfer in which the grantor has reserved a power to alter, amend, or revoke, and where he has relinquished such power in contemplation of his death. The transfers made by the decedent in 1925, and the agreements made by him in 1934 amending them, contain such a power. He relinquished the power in 1937 at the age of 81, but while in good health, not because he feared or expected death, but solely because, having discovered that the reserved power would cause the value of the corpora of the trusts to be included

in his gross estate for estate tax purposes at his death, he desired to prevent this and the resultant imposition of the additional estate tax upon his estate. A relinquishment so motivated falls *per se* within the ambit of the statute.

2. Since the statute requires the inclusion in the gross estate of the corpus of a trust which either contains a reserved power to amend, or where such a power has been relinquished in contemplation of death, the point made by the court below that the relinquishment is not a transfer and therefore not a substitute for a testamentary disposition is irrelevant, as is likewise the circumstance that a relinquishment does not involve a transfer "out of the decedent's estate." Congress has required the inclusion, and its power to do so is not in question. Even so, it is now well settled that both such reservation and relinquishment are substitutes for testamentary dispositions.

3. Nor is it necessary, as the court below held, that, in order to bring the transaction within the statute, the motivating factor for the relinquishment be the decedent's belief that death was near at hand. This involves a definition of "contemplation of death" which is clearly inconsistent with the holding of this Court in *United States v. Wells*, 283 U. S. 102, and other cases, which make it plain that the Congressional purpose was not to restrict the application of the statute to

situations where the decedent turned to a consideration of the final devolution of his property because he thought he was about to die. The statute is satisfied where, for any other reason, the decedent becomes concerned about what could happen to his property at his death and as a result takes action to control, or in some manner affect, its final devolution.

If more were needed to establish that Congress did not intend to use the phrase "made in contemplation of death" in the sense of "made in contemplation of dying," it lies in the fact that its application in the latter sense to a relinquishment of a reserved power to amend the trust would be meaningless. For it would be purposeless for a decedent to relinquish such a power solely because he expected the very event to happen which would automatically release it. Hence the vital question always is what the decedent's reasons were for making an *inter vivos* transfer at the time he did, or for releasing the power he had reserved with respect thereto.

ARGUMENT

THE RELINQUISHMENT OF THE POWER TO AMEND THE TRUSTS FOR THE PURPOSE OF AVOIDING THE ESTATE TAX WITH RESPECT THERETO, WAS MADE BY THE DECEDENT "IN CONTEMPLATION OF HIS DEATH" WITHIN THE MEANING OF SECTION 302 (d) (1) OF THE REVENUE ACT OF 1926, AS AMENDED

1. Section 302 (d) (1) of the Revenue Act of 1926, as amended (Appendix, *infra*), provides that the value of the gross estate of a decedent

shall be determined by including the value at the time of his death of all property, *inter alia*, to the extent of any interest therein of which he has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power by the decedent, either alone or in conjunction with any person, to alter, amend or revoke, or where he relinquished such power in contemplation of his death.[2]

Each of the transfers in trust which the decedent had made to his daughter and son in 1925,

[2] The first sentence of Section 302 (d) of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Section 302 (d) (1) of the Revenue Act of 1926, as amended by Section 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680 (Appendix, *infra*), are substantially identical with Section 302 (d) of the Revenue Act of 1924, except that the phrase "adequate and full consideration in money or money's worth" is substituted for the phrase "fair consideration in money and money's worth" appearing in the earlier statute. A second sentence was added in Section 302 (d) of the Revenue Act of 1926, dealing with relinquishments made within two years of death, which, with the addition of the phrase "unless shown to the contrary" (designed to eliminate the conclusive character of the presumption), became Section 302 (d) (3) of the Revenue Act of 1926, as amended by Section 401 of the Revenue Act of 1934 (Appendix, *infra*). Section 401 of the Revenue Act of 1934 made no other changes in Section 302 (d) of the Revenue Act of 1926, except those made by the addition of Section 302 (d) (2) (Appendix, *infra*), which have no relevance here. Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, made amendments to Section 302 (d) (1) of the Revenue Act of 1926, as amended, but under express provisions of Section 805 (b) they do not affect this case and in any event are not material here.

and the agreements whereby he later, in 1934, made additions thereto, contained a reservation of such a power. (R. 129.) But, when in 1937, he ascertained that, under the decision of this Court in *Helvering* v. *City Bank Co.*, 296 U. S. 85, the reserved power would sweep the corpora of the trusts into his gross estate for estate tax purposes, he forthwith relinquished it in order to prevent such inclusion and the imposition upon his estate of the additional estate tax resulting therefrom. In these circumstances, the District Court found that the decedent's purpose in relinquishing the power when he did was "so that they [the trusts] would not be a part of his estate for estate tax purposes" (Finding 12, R. 123–124), such finding being accepted by the court below. (R. 132).[3]

[3] While the court below also accepted the District Court's finding that the decedent was motivated in making the transfers by his desire to meet the necessities of his children and set aside property for them free of all claims for taxes or otherwise, and that the release of the power on May 1, 1937, fell within the scope of the purpose and motive he had in making the transfers in 1925 and 1934 (Finding 13, R. 124), this is just another way of saying that, when the decedent made the transfers for the purposes stated, he wanted them to be free from tax claims and assumed that they were. Although the dominant motive for the transfers themselves may not have been a purpose to avoid the tax (R. 88), the relinquishment of the reserved power was induced by that motive (R. 123). Moreover, the only purpose to be subserved by the relinquishment that was not already accomplished by the original transfers was escape from the death taxes.

A similar situation prevailed in *First Trust & Deposit Co.* v. *Skaughnessy*, 134 F. 2d 940 (C. C. A. 2d), certiorari denied.

While the decedent was 81 years of age at the time he released the power, the Government does not claim that he was motivated in doing so by any fear or expectation of death induced by his age or by the condition of his mind or body. On the other hand, the record is devoid of any proof that he was actuated by any other motive in releasing it than to avoid the death tax. There is no basis in the evidence for a finding that he would have released it if he had not deemed it necessary or expedient to do so in order to avoid the tax.

The statute deals with transfers and also with relinquishments of powers which, if retained, would have rendered prior transfers taxable. With respect to both classes the imposition of the tax depends upon the existence of a contemplation of death motive. Accordingly the cases dealing with transfers in contemplation of death furnish persuasive precedents for determining whether or not a purpose to avoid the tax is a death motive.

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320 U. S. 744, where the Second Circuit affirmed a judgment of the District Court entered on the verdict of a jury which it had directed in the Government's favor. In that case, the decedent had also assumed that the transfer he had made was free from the estate tax; but, when advised by an attorney to the contrary, he revoked the trust and made a new transfer, on the attorney's advice, which had no life purpose and would have accomplished nothing not previously effected by the first transfer except avoidance of the tax. The second transfer was held to have been in contemplation of death as a matter of law.

The conclusion that a transfer so motivated falls within the statute is supported by *United States* v. *Wells*, 283 U. S. 102, requiring the inclusion in the gross estate of transfers which are motivated by a purpose that can become effective only at death. As explained by the Court (pp. 116–117), the very purpose of Congress in enacting the contemplation of death provision was to reach substitutes for testamentary dispositions in order to prevent the evasion of the tax. In support of this view, the Court cited *Nichols* v. *Coolidge*, 274 U. S. 531, 542, and *Milliken* v. *United States*, 283 U. S. 14, 15, where it had stated (p. 23):

> It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death.

Hence, in the *Wells* case, the Court said (p. 117):

> As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be "contem-

plated," that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition.

A purpose to avoid the tax is such a motive; at least, it is a motive which would cause a decedent to make an *inter vivos* transfer instead of a will, or instead of permitting his property to pass under the intestacy laws. If a transfer made to avoid the tax is within the statute, it follows, of course, that a relinquishment made for a similar motive is likewise within the reach of the tax.

There was, of course, no purpose to avoid the tax established in the *Wells* case, so that the decision of the Court in that case could only have been implicitly responsive to the Government's contention therein that a purpose to avoid the tax brought a transfer so motivated within the contemplation of death provision of the statute.[4]

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[4] In this connection, the Government said in its brief in that case, No. 252, October Term, 1939 (p. 18):

> Inasmuch as the character of the gift, for purposes of taxation is determined by the motive actuating it, evidence of an intent to avoid the tax is convincing evidence that the donor was concerned with the distribution of his property in anticipation of his death. On the other hand, the absence of such evidence can not overcome the statutory presumption.

It is to be noted, moreover, that as early as *Shukert* v. *Allen*, 273 U. S. 545, this Court, speaking through Mr. Justice Holmes, took occasion to point out that the transfers there under consideration were not made for the purpose of avoiding the tax. The decision of the Court might well have been different had it appeared that the transaction there was so motivated.

Any other construction of the statute would, however, obviously serve to defeat the indicated purpose of Congress and is, therefore, inadmissible. *Taylor* v. *United States*, 3 How. 197; *United States* v. *Stowell*, 133 U. S. 1; *United States* v. *Hodson*, 10 Wall. 395; *United States* v. *Graf Distilling Co.*, 208 U. S. 198; *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916 (C. C. A. 2d), certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582. Thus, in the last cited case, the Second Circuit, in holding that a purpose to avoid the tax brought the transfers there under consideration within the statute, said (p. 923):

> Statutory provisions intended to prevent the evasion of the general purposes of the statute ought to be fairly and reasonably construed so as to carry out their purposes. * * * The rule is specifically applicable to statutes providing for the taxation of transfers in contemplation of death. *In re Fulham's Estate*, 96 Vt, 308, 119 A. 433.

We submit that, by hypothesis, a transfer so motivated falls within the ambit of the statute, for it is absurd to say that this is not the type of transfer which Congress was attempting to reach.

It is in this connection to be noted that in the *Wells* case (283 U. S., p. 114, fn. 9) the Court cited with evident approval certain decisions of the Supreme Court of California which gave the term "contemplation of death" a broader significatica than that accorded it by the lower court in

that case—namely, *Estate of Reynolds*, 169 Cal. 600; *Estate of Pauson*, 186 Cal. 358; *Chambers* v. *Larronde*; 196 Cal. 100. Thus, in the *Larronde* case, the California court held (p. 113) that "an undisclosed intent to secure to her children the entire, undiminished fruits of her life's work while, at the same time, attempting to avoid the imposition of an inheritance tax and the expenses of probate incident to a testamentary disposition of her property" would tend to support a finding that the transfers were made in contemplation of death. These cases involved an amendment to the California taxing statute specifically providing that the phrase was not restricted to the expectancy of death actuating gifts *causa mortis*, but extended to all transfers made in lieu of or to avoid the passing of property by testate or intestacy laws. In the *Reynolds* case, it was stated by way of dictum that the amendment did not change the meaning of the phrase, but in the *Larronde* case, where the transfers had occurred prior to the amendment, the court gave the term "contemplation of death" standing alone, as it did in the original statute, the same meaning as was given to it under the amendment.

Thus, while the California legislature undertook by the amendment specifically to deal with the decedent's purpose to prevent the passing of the property by testate or intestacy laws, it was not necessary for it to do so. Similarly, this

Court in the *Wells* case did not deem it necessary for Congress to have dealt specifically with the matter of motives, and, assuredly, it was not necessary for Congress to classify them, or expressly to say that a purpose to prevent the inclusion of property in the gross estate brought a transfer so motivated within the statute. Cf. *City Bank Co.* v. *McGowan*, 323 U. S. 594. It is sufficient that, as the Court said, the purpose of Congress was to sweep into the gross estate property transferred by substitutes for testamentary dispositions springing from a certain type of motives which may be denominated "death motives" as distinguished from "life motives."

In any case, there is, we submit, now no acceptable authority which has construed the *Wells* case as justifying a conclusion that a purpose to avoid the tax is not a "death motive," unless the decision of the court below is regarded as such. See, aside from *Farmers' Loan & Trust Co.* v. *Bowers*, already cited (68 F. 2d 916), *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794 (C. C. A. 2d), certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634; *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940 (C. C. A. 2d), certiorari denied, 320 U. S. 744;[5] *Commonwealth Trust Co. of*

[5] In this case, the Second Circuit approached the question from the standpoint of the burden of proof resting upon the taxpayer to show that the transfer was not made by the

Pittsburgh v. *Driscoll*, 137 F. 2d 653 (C. C. A. 3d), affirming *per curiam* a decision of the District Court for the Western District of Pennsylvania, reported in 50 F. Supp. 949, "for the reasons sufficiently and satisfactorily given in the opinion of" the District Court, certiorari denied, 321 U. S. 764. In this connection, it is to be observed that the contrary decision of the Third Circuit in the case of *Denniston* v. *Commissioner*, 106 F. 2d 925, upon the authority of which the District Court rested its decision in the case at bar, but which the court below did not mention, was, we

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decedent in contemplation of his death and concluded that, where the evidence disclosed a purpose to avoid the tax as the actuating factor for changing the form of the gift, the District Court had properly directed a verdict against the taxpayer. Moreover, in both of the *Farmers' Loan & Trust Co.* v. *Bowers*, cases, *supra*, the same court had held it sufficient to bring the transfers there in question within the statute that the purpose to avoid the tax was one of the substantially inducing motives for the transfer. See, to similar effect, *Anneke* v. *Willcuts*, 1 F. Supp. 662 (Minn.); *Tait* v. *Safe Deposit & Trust Co. of Baltimore*, 74 F. 2d 851 (C. C. A. 4th); as also 1 Paul, Federal Estate and Gift Taxation, Sec. 6.05, p. 251, fn. 4. Cf. *Helvering* v. *Stock Yards Co.*, 318 U. S. 693, 699. The reason is that the statute does not confine itself to transfers made *solely* in contemplation of death. This view is supported likewise by the decisions of state courts. See, e. g., *Wimpfheimer* v. *Martin*, 127 N. J. Eq. 587; *Dommerich* v. *Kelly*, 132 N. J. Eq. 220; *Sellinger's Adm'r* v. *Reeves*, 292 Ky. 114, 119; *In re Hartford*, 122 N. J. Eq. 489, 491, affirmed *sub nom. Hartford* v. *Martin*, 120 N. J. L. 564, affirmed, 122 N. J. L. 283. See also *Estate of Boole*, 98 Cal. App. 714, 722.

believe, in effect overruled by the Third Circuit in its decision in *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, *supra*. See also *Northern Trust Co.* v. *Commissioner*, 116 F. 2d 96 (C. C. A. 7th), and *Commissioner* v. *Hofheimer's Estate*, 149 F. 2d 733 (C. C. A. 2d), where it was assumed by the entire court that a release of a reserved power made to avoid the tax would come within the statute, but the Tax Court's decision was reversed by a majority of the court for lack of substantial evidence to support the Tax Court's finding that that was the motive. The applicable regulations also so provide.[6] And see further, I Paul, Federal Estate and Gift Taxation (1942), Sec. 6.07, p. 257.

The District Courts are now generally in ac-

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[6] Article 16 of Treasury Regulations 80 (1937 ed.), as amended by T. D. 4966, 1940-1 Cum. Bull. 220, reads as follows:

> This phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). *A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax*, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition. (Italics supplied.)

cord. See e. g., *Anneke* v. *Willcuts*, 1 F. Supp. 662 (Minn.); *Mather* v. *McLaughlin*, 57 F. 2d 223 (E. D. Pa.); *Brown* v. *Routzahn*, 58 F. 2d 329 (N. D. Ohio), reversed on another ground, 63 F. 2d 914 (C. C. A. 6th), certiorari denied, 290 U. S. 641; *Turner* v. *Hassett*, 37 F. Supp. 996, 998 (Mass.); *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra* (50 F. Supp. 949 (W. D. Pa.)); *Slifka* v. *Johnson* (S. D. N. Y.), decided May 22, 1945, not officially reported but found in C. C. H. Federal Inheritance, Estate and Gift Tax Service, par. 10, 205.

2. Since the statute requires the inclusion in the gross estate of the corpus of a trust which

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So also are a number of the decisions of the Tax Court, particularly the later ones. See, e. g., *Denniston* v. *Commissioner*, 38 B. T. A. 1076, 1084–1086, reversed by the Circuit Court of Appeals for the Third Circuit in 106 F. 2d 925; though, as has also been stated, that court has since in effect overruled its decision in that case by its *per curiam* affirmance of the District Court's decision in the *Commonwealth Trust Co. of Pittsburgh* case, *supra* (137 F. 2d 653); *Estate of Hofheimer* v. *Commissioner*, 2 T. C. 773, 785–786, reversed by the Second Circuit in 149 F. 2d 733, because the majority of the court concluded that there was no evidence to establish the purpose to avoid the tax; *Estate of Vanderlip* v. *Commissioner*, 3 T. C. 358, 361, now pending in the Second Circuit on a petition for review filed by the taxpayer. Cf. *Taft* v. *Commissioner*, 33 B. T. A. 671, where it was said that if there were any evidence that death or death or consideration, this would perhaps support a finding (affirmed on other grounds, 92 F. 2d 667 (C. C. A. 6th), affirmed, 304 U. S. 351.)

either contains a reserved power to alter, amend, or revoke, or where such power has been relinquished by the grantor in contemplation of his death, the point made by the court below that such relinquishment is not a transfer, and hence not a substitute for testamentary disposition, is obviously irrelevant. For the same reason it is irrelevant that the relinquishment did not involve a transfer "out of the decendent's estate" (R. 136), and that it is therefore not a substitute for testamentary disposition.[8] The power of Congress to require the inclusion in the decedent's gross estate of a transfer with respect of which such a power has been reserved, or where it is

[8] The District Court had stated the matter thus (R. 113–114):

> The statute is just a rule by which to separate property which in substance is a part of an estate from that which is not. Under that rule, if a gift in form is in reality a part of an estate, it so remains, notwithstanding the transfer. It is not the transfer which makes the property estate property but it must be estate property in substance before the transfer can be disregarded. The property is classified as estate property or not according to the fact existing at the time of transfer and not by any desire to avoid taxes. The ultimate fact which results in retaining a complete gift in the estate is a special concern about approaching death. A desire to avoid taxes has no legal effect and it has no probative value even as evidence of special concern about death, because in any transfer such a desire exists equally whether the thought of death is special or general. If a special concern about death exists, then a desire to avoid taxes becomes the motive for electing to transfer by gift instead of by will. At that point the statute applies and declares such a transfer to be in effect a gift after death.

relinquished in contemplation of his death, is not in question, and it has required the inclusion. Even so, that such reservation and such relinquishment are substitutes for testamentary disposition is established. See *Helvering* v. *City Bank Co., supra* (296 U. S. 85); *Burnet* v. *Guggenheim,* 288 U. S. 280, 286–287; *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 42–43. Cf. *Fernandez* v. *Weiner,* decided December 10, 1945. Except for the relinquishment, only the decedent's death would have released the power, and by the same token only then would full dominion and control thereover have been brought into being or ripened in the beneficiaries. See *Tyler* v. *United States,* 281 U. S. 497, 503; *United States* v. *Jacobs,* 306 U. S. 363, motion to set aside judgment denied, 306 U. S. 620; *Porter* v. *Commissioner,* 288 U. S. 436, 444. Cf. *Central Hanover Bank Co.* v. *Kelly,* 319 U. S. 94, 97–98, and *Whitney* v. *Tax Commission,* 309 U. S. 530.

3. Nor is it necessary, as the court below held, that, in order to bring the transaction here within the statute, the motivating factor for the relinquishment be the decedent's belief that death is near at hand. The view that this is necessary involves a definition of "contemplation of death" which is clearly inconsistent with the holding of this Court in the *Wells* case, as well as with its holdings in *McCaughn* v. *Real Estate Co.,* 297 U. S. 606, and in *City Bank Co.* v. *McGowan,* 323 U. S. 594. These decisions make it plain that the

Congressional purpose was not to restrict the application of the statute to situations where the decedent turns to a consideration of the final disposition of his property because he thought he was about to die. The statute is satisfied where, for any other reason, the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control, or in some manner affect, its devolution. In such a situation the fact that the decedent is past middle age may prove to be an important consideration—though that the decedent need be in advanced age has been denied (*First Trust & Deposit Co.* v. *Shaughnessy, supra*). His state of health has also been regarded as irrelevant (*McCaughn* v. *Real Estate Co., supra; First Trust & Deposit Co.* v. *Shaughnessy, supra*). Indeed, if it were not irrelevant, such case as *City Bank Co.* v. *McGowan, supra, Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra, In re Kroger's Estate*, 145 F. 2d 901 (C. C. A. 6th), certiorari denied, 324 U. S. 866, and *Pate* v. *Commissioner*, 149 F. 2d 669 (C. C. A. 8th), could not have been decided as they were.

It will in this connection be noted that the Court in the *Wells* case (283 U. S., p. 114, fn. 9) cited with evident disapproval a number of cases upon which the lower court had relied, holding that, to bring a transfer within the statute, there must be a present apprehension, from some

existing bodily condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause of the transfer.[9] The Court also called attention to a number of other decisions to the same effect, both state and federal, not cited by the lower court, the federal cases being *Gaither* v. *Miles*, 268 Fed. 692 (Md.), *Vaughan* v. *Riordan*, 280 Fed. 742 (W. D. N. Y.), *Flannery* v. *Willcuts*, 25 F. 2d 951 (C. C. A. 8th), and *Beeler* v. *Motter*, 33 F. 2d 788 (Kans.).[10]

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[9] Among the cases which the Court thus listed are *Spreckels* v. *State of California*, 30 Cal. App. 363, which held that expectation of death must be the immediate and prompting motive for the transfer—that it must be the motive without which the transfer would not have been made; *Shwab* v. *Doyle*, 269 Fed. 321 (C. C. A. 6th), which on appeal to this Court was reversed on another ground, 258 U. S. 529, so that the question of the correctness of the Sixth Circuit's similar definition was not considered, although that question was extensively argued both on briefs and oral argument, the Government there, too, contending for a broader construction of the statute; *Rea* v. *Heiner*, 6 F. 2d 389 (W. D. Pa.), and *Starck* v. *Commissioner*, 3 B. T. A. 514.

[10] As opposed to this view the Court in the same footnote cited, among others, *Tax Commission* v. *Parker*, 117 Ohio St. 215, writs of error dismissed, 278 U. S. 566, involving an Ohio statute which defined the term "contemplation of death" as meaning the expectation of death which actuates a person in making a will. In that case, the Ohio court pointed out (pp. 221–222) that it is the exception rather than the rule that minds of men are actuated to make a will because of a sense of impending death; that generally they make wills when additional moral obligations have

If further proof were needed that Congress did not intend to use the phrase "made in contemplation of death" in the sense of "made in contemplation of dying," it lies in the fact that its application in the latter sense to a relinquishment of a reserved power to amend a trust would be meaningless. For, since a grantor must always be aware of the fact that his death would, without more, inevitably result in the release of the power, it would be purposeless for him to release it solely because he expected the very event to happen which would automatically release it. Thus to restrict the tax on relinquishments to cases where the grantor acted in the belief he was dying would lead to the incongruity that Congress imposed a tax upon an event which would never happen.

Since the thought of dying is not the only occasion which leads a person to consider the question of a final disposition of his property, it is not to be supposed that Congress would place such a limitation upon a revenue measure. The entering into of a second marriage not infrequently is such an occasion. See *In re Kroger's Estate, supra;* [11] *Pate*

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been assumed and the controlling fact in determining whether a gift was made in contemplation of death is whether the gift is in the nature of a testamentary distribution of property rather than the bestowal of a favor upon the donee. See also comment on that case in *Burton, Exr.* v. *Tax Commission*, 37 Ohio App. 183, 187–188.

[11] In this case the Sixth Circuit (145 F. 2d 901, 907) disagreed with the contrary view of the Third Circuit in *Lippin-*

v. *Commissioner, supra;* also *Nicholas* v. *Martin,* 128 N. J. Eq. 344. Similarly, the occasion presented in *City Bank Co.* v. *McGowan, supra,* was not the decedent's thought of dying, but the demand of her daughter and the guardian of the minor children of her deceased daughter that they be given a portion of her estate then instead of having to await her death, because she had become insane and could not use it and they would get it in any event when she died. And, in *McCaughn* v. *Real Estate Co., supra,* the occasion which caused the decedent to turn to a consideration of the devolution of his property was the thought that his children would dissipate it if and when they received it in the ordinary course of events. Accordingly, he placed it in a spendthrift trust for them.

Similarly here, the occasion for the decedent's turning to a consideration of a relinquishment of the reserved power was not the thought of dying. It was that his son had advised him that, in view of the decision of this Court in *Helvering* v. *City Bank Co., supra,* the consequence of its retention would be the inclusion of the corpora of the trusts in his gross estate for estate tax purposes. Emphatically, he did not want that to happen. Thus his concern was with what would happen to his

cott v. *Commissioner,* 72 F. 2d 788, as also with that of the Seventh Circuit in *Kaufman* v. *Reinecke,* 68 F. 2d 642, where the decedent had made a gift to his wife of stock in order to prevent his brothers from getting it at his death under a contract he had made with them.

estate at his death, and his sole purpose in relinquishing the power was to conserve it against a claim of the Government for the additional estate tax resulting from the inclusion of the corpora of the trusts therein. And so he relinquished the power in order to avoid the tax.

The examples given will suffice to prove the point, although they could be multiplied. Nevertheless, the difficulty which the Government has encountered in the equal administration of the law has been that not only the federal courts, but the Tax Court as well, have at times interpreted the *Wells* case as holding that the question whether a decedent made a transfer in contemplation of his death within the meaning of the statute is made to depend upon whether the thought of dying as the tentatively assumed motivating factor therefor was disproven by life purposes. The evidence adduced by the beneficiaries more or less tends to establish some life purpose because it is inevitable that a living person will secure relief from the worries of the management of the transferred property, and will save income taxes. Other incidental life purposes may be the equalization of gifts among children, and the like. But such life motives are not inconsistent with, and therefore do not overcome, the Commissioner's determination of a death motive, unless the statute is properly restricted to transfers made with the thought of dying. But this interpretation of the statute,

or rather this interpretation of the holding in the *Wells* case, has not only thwarted the purpose of Congress to prevent evasion of the tax,[12] but runs counter to the very theory of estate taxation, that the transmission of property from one generation to another shall bear its just proportion of the burden of the tax.[13]

Thus, the real question, adverted to by the Ohio court in *Tax Commission* v. *Parker*, 117 Ohio St.

[12] The situation in which the Government thus finds itself in the administration of the law is graphically described in Harriss, *Gift Taxation in the United States*, 13–19 (1940). See also Harriss, *Gifts in Contemplation of Death*, 19 Tax Magazine 216, 219 (April, 1941); Eisenstein, *Are We Ready for Estate and Gift Tax Revision?*, 23 Tax Magazine 316, 319 (April, 1945); Atlas, *Gifts in Contemplation of Death*, 23 Tax Magazine 421 (May, 1945); Pavenstedt, *Taxation of Transfers in Contemplation of Death: A Proposal for Abolition*, 54 Yale L. J. 70; and the Report to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. II, Part 2, p. 111 (1933).

[13] Harriss, *Gift Taxation in the United States*, 19–20 (1940), refers to this as the economic test and points to the fact that four cases tend, in varying degrees, to support it, namely, *McCaughn* v. *Real Estate Co.*, 297 U. S. 606; *Tax Commission* v. *Parker*, 117 Ohio St. 215, writs of error dismissed, 278 U. S. 566; *Will of Harnischfeger*, 208 Wis. 317 (cf. *Harnischfeger* v. *Commissioner*, 31 B. T. A. 224, 231, involving the same transfers); and *Schweinler* v. *Thayer-Martin*, 117 N. J. Eq. 67, affirmed, 13 N. J. Misc. 722. To these cases could now be added *City Bank Co.* v. *McGowan*, 323 U. S. 594; *Scheider* v. *Martin*, 127 N. J. Eq. 323, affirmed, 124 N. J. L. 567, and *Nicholas* v. *Martin*, 128 N. J. Eq. 344, as well as such cases as *In re Kroger's Estate*, 145 F. 2d 901 (C. C. A. 8th), certiorari denied, 324 U. S. 866, and *Pate* v. *Commissioner*, 149 F. 2d 669 (C. C. A. 8th).

215, writs of error dismissed, 278 U. S. 566, has too often been ignored—namely, whether the gift is in the nature of a testamentary distribution of property rather than the present bestowal of a favor upon the donee. This is not to say that the motive in making the gift is immaterial. It is merely to say that a death motive may be deduced from the evidence as a whole and particularly from the nature of the transfer, and should be deduced from the transfer itself when the decedent, especially if he is in advanced years, transfers a substantial part of his property by way of trust or otherwise to the natural object of his bounty in much the same way as he would otherwise have done by his will. See *Dommerich* v. *Kelly*, *supra* (132 N. J. Eq. 220), cited in footnote 5, *supra*, p. 17, and cf. *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, *supra* (50 F. Supp. 949).

The court below should, therefore, have considered it no longer open to question that death need not in any case be contemplated in the sense that it is feared or expected, in order to bring either a transfer or a relinquishment of a power reserved therein to revoke, alter, or amend within the contemplation of death provisions of the statute. It should have considered it sufficient to show that the motivating factor was a death purpose.

CONCLUSION

The decision of the Circuit Court of Appeals should therefore be reversed and the District Court directed to enter a judgment for the petitioner, the defendant in that court.

Respectfully submitted.

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DECEMBER, 1945.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Sec. 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, tangible or intangible, wherever situated—

* * * * * *

(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

(2) For the purposes of this subdivision the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases the proper adjustment shall be made representing the interests which would have been excluded from

the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

(3) The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

* * * *

Treasury Regulations 80 (1937 ed.):

ART. 21. *Power relinquished in contemplation of death.*—If the decedent had previously held, either alone or in conjunction with another person or persons, a power to alter or amend, or revoke, or terminate a transfer made by him, and the power was subsequently relinquished in contemplation of the decedent's death (the relinquishment not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), then to the extent that the transferred property or any interest therein had been subject to such relinquished power it is to be included in the gross estate if coming within any one of the following paragraphs:

(1) Regardless of when the transfer was made, if the power was reserved at the time of the transfer and was relinquished and the decedent died after the enactment of the Revenue Act of 1916 (September 8, 1916), and the power was exercisable by the decedent alone or in conjunction with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and any adverse interest which was not substantial.

(2) When the transfer was made after the enactment of the Revenue Act of 1924 (4:01 p. m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the power was reserved at the time of the transfer and its relinquishment and the decedent's death subsequently occurred, and the power was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

(3) When the transfer was made after June 22, 1936 (the date of the enactment of the Revenue Act of 1936) and the relinquishment of the power and the decedent's death subsequently occurred, and the power was either reserved at the time of

the transfer or later created or conferred, without regard to the source from which the power was acquired, and whether exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

Within the meaning of this article, it is essential to a relinquishment of a power which is exercisable by the decedent in conjunction with another person or persons that the relinquishment by such other person or persons operates as a complete relinquishment of the power.

If the relinquishment be not admitted or shown to have been in contemplation of decedent's death, but occurred within two years prior to such death, and affected the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value in excess of $5,000 (as of the date of decedent's death, or as of the applicable date under such an election as is referred to in the second paragraph of article 15) then, to the extent of such excess, the relinquishment will be deemed, unless shown to the contrary, to have been in contemplation of decedent's death. (See article 15.)

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